

# Federal Courts and FERC: Developments for States

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# Presentation Contents

1. Legal Background
2. Developments in:
  - a) Wholesale electricity markets
  - b) Distributed energy resources
  - c) Electric transmission and natural gas pipelines



# Limits on State Authority

1. Preemption by Federal Law
2. The Dormant Commerce Clause



# Preemption Tests

Federal action preempts State law when:

- 1) Congress has explicitly preempted State law (*Express*);
- 2) A court determines Federal law occupies the field (*Field*);
- 3) A court determines that Federal law conflicts with State law (*Conflict*).

# The Commerce Clause

US Constitution, Article I, Section 8, § 3

[The Congress shall have the power]:

To regulate Commerce with foreign Nations,  
and among the several States, and with the  
Indian Tribes;

# Dormant Commerce Clause

A state may not:

- 1) Discriminate against out-of-state businesses
- 2) Regulate transactions that occur wholly outside the state
- 3) Unduly burden interstate commerce



# Wholesale Electricity Markets



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# Zero Emission Credits

- Awarded by New York (PSC order) and Illinois (statute) to select in-state nuclear plants
- Based on the social cost of carbon and the regional emissions rate ( $\approx \$17 / \text{MWh}$ )



# ZEC Federal Court Cases

- Legal claims against ZECs:
  1. States are regulating wholesale sales
  2. States are interfering with FERC-regulated markets
  3. States are discriminating against out-of-state generators

# ZEC Federal Court Cases

- Federal district courts dismissed Federal Power Act preemption and dormant Commerce Clause claims
- Generators filed appeals in 2nd and 7th Circuits
  - Oral arguments held in January, March
  - U.S. government expected to file brief soon

# ZEC Federal Court Cases

*NY District Court:*

“The ZEC sales and the wholesale sales of energy or capacity are entirely separate transactions, with the ZEC sales occurring independently of the wholesale auction and neither one conditioned on the other. Therefore, the ZEC program does not adjust or set the amount of money that a generator receives in exchange for the generator’s sale of energy or capacity into the auction.”

# ZEC Federal Court Cases

*NY District Court:*

“The death knell for Plaintiffs’ field preemption argument is their failure to distinguish ZECs from RECs. . . . If RECs are not preempted . . . then the Court fails to see how ZECs are.”

# ZEC Federal Court Cases

*IL District Court:*

“Plaintiffs’ theory of conflict preemption is that distorting the wholesale market conflicts with FERC’s preference for competitive auctions. This is too broad a theory of preemption and would inappropriately limit state authority.”



# ZEC Federal Court Cases

*NY District Court:*

“Plaintiffs entirely fail to allege any injury arising from discrimination against or an undue burden on out-of-state economic interests. As to their claim that the ZEC program facially discriminates against out-of-state nuclear power providers by awarding ZECs only to New York nuclear power plants, Plaintiffs do not allege that they own or represent an out-of-state nuclear power plant.”

# ZEC Federal Court Cases

*IL District Court:*

“The statute gives neutral, non-discriminatory standards to the agencies, and plaintiffs do not allege that the agencies will deliberately flout the ZEC bid-selection process.”

# ZEC Federal Court Cases

*Big Questions on Appeal:*

- What will the consequences be for other state programs?
- Will courts expand *Hughes*?

# FERC Actions

- May 1–2, 2017 Technical Conference
- ISO-NE Capacity Market
- PJM Capacity Market



# FERC Actions

*Technical Conference Notice, Docket AD17-11:*

“There has been increased interest by state policy makers to pursue policies that prioritize certain resources or resource attributes. Because the wholesale competitive markets . . . select resources based on principles of operational and economic efficiency without specific regard to resource type, there is an open question of how the competitive wholesale markets. . . can select resources of interest to state policy makers while preserving the benefits of regional markets.”



# FERC Actions

*Five paths forward:*

1. Limited MOPR
2. Accommodate state policies
3. Maintain the status quo
4. Price state policies
5. Expand MOPR





# FERC Actions

*ISO-NE Capacity Market Order*, 162 FERC ¶ 61,205

- FERC approves “Substitution Auction”
- “Absent a showing that a different method would appropriately address particular state policies, we intend to use the MOPR to address the impacts of state policies on the wholesale capacity markets.”

# FERC Actions

*PJM Capacity Market Proposals* (filed April 9)

- Capacity Repricing Proposal
- MOPR-Ex



# Distributed Energy Resources



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# Winding Creek Solar v. CPUC

*Court held RE-MAT program is preempted*

- CPUC required utilities to offer a feed-in-tariff for renewable generators smaller than 3 MW; rate periodically adjusted based on auction
- Program is not compliant with PURPA
  - 750 MW cap inconsistent with PURPA must-buy rule
  - Rate not based on avoided cost

# FERC Actions

*Advanced Energy Economy*, 161 FERC ¶ 61,245

- States may not prevent energy efficiency resources from participating in the PJM capacity market (except KY)
- “Like compensation for demand response, the Commission has jurisdiction over the participation of EERs in organized wholesale markets as a practice directly affecting wholesale markets, rates, and prices.”



# FERC Actions

## *Order No. 841: Electric Storage Resources*

- Requires each RTO to develop a “participation model” for energy storage resources that allows them to provide all services they are technically capable of providing
- All storage resources larger than 100 kW may sell directly to an RTO, even if located behind-the-meter
- Does not allow states to “opt-out”





# FERC Actions

## *Technical Conference on DER Aggregation*

- FERC proposed to require RTOs to establish participation models for DER aggregators
- FERC sought additional information before deciding whether to finalize the proposal



# Electric Transmission and Natural Gas Pipelines



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# Constitution Pipeline v. NY DEC

## *Second Circuit decision*

- NY DEC denied a Clean Water Act permit to a pipeline developer awarded a certificate by FERC
- Second Circuit held that NY's review was not preempted by the Natural Gas Act
- Constitution has petitioned SCOTUS for cert.
  - SCOTUS decision expected this week.

# LSP Transmission v. Lange

- Transmission develop alleges that right-of-first refusal law violates the dormant Commerce Clause
- US Government filed in support of LSP



# State Power Project

Examining State Authority in Interstate Electricity Markets



About Key Concepts **State Cases** Policy Resources

- Tracks recent lawsuits challenging State electricity policies under the dormant Commerce Clause or Supremacy Clause
- Sign up for updates - <http://statepowerproject.org/updates/>



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